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No. 96-474

In the Supreme Court

OF THE

United States

PACIFIC LUMBER COMPANY,
Petitioner,
vs.
MARBLED MURRELET,
(BRACHYRAMPHUS MARMORATUS);
ENVIRONMENTAL PROTECTION INFORMATION CENTER,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF REPLY

Respondent attempts, with extravagant claims of waiver, to deflect this Court's review of the important issues presented in the Petition for a Writ of Certiorari. With respect to the first two issues, both of which involve interpretation of the ESA in light of this Court's opinion in *Babbitt v. Sweet Home Chap. of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995), respondent concedes that "petitioner relied heavily on *Sweet Home*" in the Court of Appeals. Opp., p. 18. Because *Sweet Home* was rendered after entry of judgment in the district court, the Court of Appeals properly exercised its discretion to review the judgment in light of that decision. Moreover, contrary to respondent's assertions, the ESA issues are squarely presented by both the district court's findings and the opinion of the Court of Appeals. Indeed, respondent concedes that the district court found that the "proposed future logging would actually kill or injure [marbled murrelets] by significantly

impairing their ability to breed and survive." Opp., p. 1. That finding, expressly affirmed by the Ninth Circuit (Pet.Appx. pp. 11a-17a), encompasses both the first two issues presented in the Petition.

Nor is there any basis for respondent's contention that, by failing to object to the admission of evidence, petitioner waived the third issue presented in the Petition regarding the probative value of purported scientific evidence. *See* Opp., p. 2. Respondent confuses, as did the Ninth Circuit, the separate concepts of admissibility and probative value of evidence. Failing to recognize that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is based upon fundamental principles embodied in Rules 401 and 402 of the Federal Rules of Evidence, the Ninth Circuit held (and respondent argues) that failure to object to the admissibility of purported scientific evidence waives objection to the probative value of that evidence. That ruling inevitably will result in confusion in the application of *Daubert* in particular and the Federal Rules of Evidence in general.[1]

REPLY TO OPPOSITION

I.

THE CLAIMS OF WAIVER ARE BASELESS.

Respondent asserts that the first two issues presented in the Petition were not raised in the district court and that

[1] Respondent disingenuously refers (Opp., p. 4) to "unchallenged factual findings" made by the district court. In fact, in the Court of Appeals, petitioner made direct challenges to several central findings on the ground that, as a matter of law, they were unsupported by any valid scientific evidence. *See* Opn. Br., pp. 2-3, 4, 23-24; Reply Br., pp. 7-13. The third issue presented in the Petition is whether the Ninth Circuit erroneously refused to review that evidence and those findings.

therefore they should be deemed waived. Respondent is wrong for two independent reasons.

First, as respondent must necessarily acknowledge (Opp., p. 18), this Court's decision in *Sweet Home* was rendered after entry of the district court's findings and judgment, and "petitioner relied heavily on *Sweet Home*" in the Court of Appeals. For those reasons, the Court of Appeals exercised its discretion to consider *Sweet Home*-based arguments. Pet.Appx., pp. 7a-8a.

Respondent, however, argues that *Sweet Home* did not make "any law" on the points at issue and that therefore the Court of Appeals abused its discretion in considering arguments based on *Sweet Home*. Opp., pp. 18-19. Perhaps, if respondent's interpretation of *Sweet Home* were correct, it would also be correct that *Sweet Home* made no "new law." That, however, was precisely the question before the Court of Appeals, and the same question is presented in the Petition to this Court. As this Court has declared:

> It suffices for our purposes that the court below passed on the issue presented, [citations omitted], particularly where the issue is, we believe, " 'in a state of evolving definition and uncertainty,' " [citations omitted] and one of importance to the administration of federal law.

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1099 n.5 (19a1). Unquestionably, the ESA issues raised in the Petition are "in a state of evolving definition and uncertainty" and involve important questions of federal law.[2]

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[2] Respondent also argues that, because petitioner relied upon pre-*Sweet Home* authorities as well as *Sweet Home* in the Court of Appeals, petitioner was "capable" of raising any and all arguments in the district court. Opp., pp. 18-19. Petitioner does not dispute either that it marshalled all authorities that it believed provided support for its position or that it was "capable" of raising arguments with or without support in case law. However, neither of those facts is relevant to the controlling

Second, respondent is incorrect in its assertion (Opp., p. 12) that "the record does not raise" the issues presented in the petition. That assertion is directly refuted by the district court's ultimate finding in support of the issuance of the injunction:

> The harvesting of THP-237 *will likely* cause a violation of the ESA by sufficiently degrading the birds' critical nesting habitat to the extent that *it will significantly impair the marbled murrelets' essential behavioral patterns, including breeding, feeding and sheltering.*

Pet.Appx. C, pp. 94a-95a; emphasis added. That finding encompasses both the first two issues presented in the petition. Indeed, respondent itself is schizophrenic on this point, arguing on the one hand that the issues are not presented and on the other hand that the district court made exhaustive findings on all relevant points. Indeed, respondent concedes that:

> What the district court found, and the circuit court affirmed as sufficient to constitute harm under the regulation, is that *the proposed logging would result in actual death or injury to murrelets* that use the THP-237 area for nesting purposes *by significantly impairing their breeding and nesting behavior.*

Opp., p. 15; emphasis added. Thus, the issues presented in the Petition are squarely raised by the district court's rulings as affirmed by the Court of Appeals.[3]

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point: namely, that *Sweet Home* undeniably expounded at some length on the interpretation and application of section 9 of the ESA and the Regulation.

[3]Throughout its opposition, respondent quotes the district court's finding that the proposed harvest "will result in the destruction and degradation of occupied habitat, such that marbled murrelets will actually be killed *or* injured by the logging operations, *or* through significant impairment of their essential behavioral patterns." Pet.Appx.

II.

RESPONDENT CONCEDES THAT THE NINTH CIRCUIT HELD THAT "HARM" WAS SHOWN BY EVIDENCE OF "SIGNIFICANT IMPAIRMENT OF . . . NESTING."

Respondent acknowledges (Opp., p. 14) that the crux of the Ninth Circuit's holding on "harm" is the following:

> [U]nder *Sweet Home*, a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to "harm" under the ESA.

Pet.Appx. A, p. 17a. If the Ninth Circuit meant what it said, then the issue presented is (as the Petition states) whether "injury" is shown by evidence that a proposed activity will impair the breeding and/or sheltering of an unidentified number of protected animals. On that point, respondent asserts that:

> [T]he regulation itself defines actual death or injury to include significant impairment of essential behavioral patterns of protected wildlife, including sheltering or feeding.

C, p. 90a, quoted at Opp., pp. 2, 3, 6, 12; emphasis added. Respondent asserts that this constitutes a finding that birds would actually be killed directly by the proposed harvest. Opp., p. 12. However, as its disjunctive nature indicates, this finding constitutes nothing more than repetition of the conclusory language of the Regulation, and it is not a fact-based finding of direct injury. Indeed, respondent concedes that "[m]urrelets spend most of their lives at sea" (Opp., p. 5), and respondent's own evidence showed that murrelets *cannot* leave the sea during their winter molt and therefore that harvesting at that time would "probably not" directly harm them. RT 147:12-15. Moreover, the district court found that "it is impossible to determine" whether murrelets would be present during the proposed harvest time. Pet.Appx. C, p. 93a. It was, of course, respondent's burden to prove that they would be, not petitioner's burden to prove a negative.

Opp., p. 15. This, of course, assumes the issue to be decided. Moreover, omission of any requirement that, to violate section 9, impairment of breeding must cause injury to individual birds, would effectively rewrite the second sentence of the Regulation to read:

> Such act may include significant habitat modification or degradation that significantly impairs essential behavioral patterns, including breeding, feeding or sheltering.

Such a redefinition of the Regulation would be in direct defiance of this Court's admonition that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'" 115 S.Ct. at 2414 n.13.

Apparently recognizing the weakness of the rationale below, respondent also argues that the Ninth Circuit did not mean what it said, reasoning that the Ninth Circuit must have had "specific birds in mind," i.e. "the population of birds occupying the Owl Creek THP-237." Opp., p. 14. This raises an additional issue left unresolved by *Sweet Home*: whether a *population* of animals occupying a defined geographic area is equatable with the concept of "particular animals" (*Sweet Home*, 115 S.Ct. at 2414 n.13) upon which harm must be visited to activate the Regulation. Although resolution of that issue must await full briefing on the merits, petitioner submits that the requisite injury to "particular animals" cannot be satisfied by reference to a "general population." Otherwise, under respondent's theory, the entire North American population of murrelets would be "specific, identifiable" birds so that anything that "impaired" that population's breeding would be "injury" to specific, identifiable birds. The requisite showing thus would be diluted to precisely the sort of evidence that *Sweet Home* declared to be inadequate.

Respondent also tries to bring this case within Justice O'Connor's concurring opinion in *Sweet Home* by quoting the district court's finding that impairment of breeding resultant from the proposed harvest would "result in a high probability that the remaining population of marbled murrelets in this region will become extinct." Pet. Appx. C, p. 91a, quoted at Opp., p. 13. As is discussed in more detail in the Petition (at p. 9 n.3), that finding is fatally deficient in two respects. The extinction theory (advanced by a single witness) was dependent upon wholly independent catastrophic events (see RT 99:10-11) and therefore ran afoul of the requirement of proximate cause. In addition, the witness advancing the theory admitted that he had no scientific basis for it. RT 99:2-4, 160:18-19.

III.

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT INJUNCTIVE RELIEF IS AVAILABLE TO AVOID FUTURE INJURY TO A SPECIES AS A WHOLE.

Respondent places major reliance (Opp., 20-21) on this Court's use of the future tense in certain portions of *Sweet Home*. But respondent ignores this Court's assumption, in addressing the facial challenge presented in *Sweet Home* to the Regulation, that, as a result of the proposed activity in that case, "*members* of those species [involved in *Sweet Home*] will be killed or injured." 115 S.Ct. at 2412; emphasis added. Thus, this Court was discussing injury to particular, identifiable animals. Moreover, although there can be no question that there is a duty to avoid "harm" under section 9 or otherwise face the applicable penalties, that truism does not speak to the requisites for the issuance of an injunction under section 11.

Respondent also errs in asserting (Opp., pp. 22-23) that petitioner seeks an overruling, sub silentio or otherwise, of this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978).

That case involved an injunction issued against the government *under section 7* forbidding the construction of a dam that would have killed all members of a particular species. 487 U.S. at 198. This Court observed in passing that *operation* of the dam would have "harmed" that species under section 9. 487 U.S. at 184 n.30. The standards for issuance of injunctions under section 9 were not at issue or commented upon.[4]

IV.

RESPONDENT CONCEDES THAT THE NINTH CIRCUIT RULED THAT, ABSENT OBJECTION (OR ABSENT A RULING ON OBJECTIONS MADE) TO THE ADMISSIBILITY OF PURPORTED SCIENTIFIC EVIDENCE, A PARTY MAY NOT, ON APPEAL, CHALLENGE THE PROBATIVE VALUE OF THAT EVIDENCE ON THE GROUND THAT IT IS "UNRELIABLE AND IRRELEVANT UNDER DAUBERT STANDARDS."

Respondent's defense of the Ninth Circuit's ruling on the *Daubert* issue (Opp., pp. 24-28) provides a revealing example of the confusion that will result from that ruling. Although lengthy, the essence of respondent's argument is simply that:

> *Daubert* defined standards for determining whether scientific evidence is admissible, not whether it is sufficient to support a verdict or a judgment. Opp., p. 27.

Thus, according to the Ninth Circuit and respondent, evidence may be irrelevant, speculative and of no probative

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[4]There is also no merit to respondent's factual argument that, "[e]ven on petitioner's interpretation," respondent has presented "the necessary proof." Opp., p. 23. That argument is founded upon an assumption that "significant impairment of [animal's] ability to breed" alone is sufficient to establish a violation of section 9. *Id.* As discussed herein and in the Petition, it is not.

value under *Daubert* yet somehow be relevant, not speculative and have probative value under Rules 401 and 402. This argument misconceives the basis for the *Daubert* decision. Moreover, contrary to respondent's contention (Opp., pp. 26-27), the rule enunciated by the Ninth Circuit would apply in *all* cases involving challenges to the sufficiency of the evidence, not just those involving *Daubert*. It is therefore in direct conflict with the general rule applied in other circuits.

First, the Ninth Circuit's ruling underscores the need for this Court to make it clear that *Daubert* does not rest on relevancy and sufficiency tests that somehow differ from the ordinarily understood concepts of relevancy and sufficiency under Rules 401 and 402. Rather, under *Daubert*, a district court must close the gate on certain purported scientific evidence precisely because, under Rules 401 and 402, it is legally insufficient and irrelevant. In this regard, the cases cited by respondent (at Opp., p. 28) are actually contrary to the Ninth Circuit's ruling. Two of those cases hold that scientific evidence that has relevance and is not based upon speculation (i.e., that has *some* probative value) must be admitted under *Daubert* and that its ultimate weight is to be judged by the trier of fact. *See Joiner v. General Elec. Co.*, 78 F.3d 524, 530, 534-535 (11th Cir. 1996) (concurring opinion); *In re Joint Eastern and Southern Dist. Asbestos Lit.*, 52 F.3d 1124, 1132-1133 (2d Cir. 1995). However, they do not hold, or even suggest, that evidence that is irrelevant and unreliable under *Daubert*, if admitted without objection, can support a judgment.

To the contrary, in *Joiner*, the Eleventh Circuit noted that, in *Daubert*, this "Court made clear that the critical concerns of Rule 702 are evidentiary reliability and relevancy." 78 F.3d at 529. And the concurring opinion, quoted by respondent (at Opp., p. 28), stressed that, under *Daubert*,

the district court must ensure that purported scientific evidence has "some minimal level of reliability and probative value." 78 F.3d at 534; *accord*: *In re Joint Eastern and Southern Dist. Asbestos Lit.*, 52 F.3d at 1132 (under *Daubert*, district court is "to evaluate the reliability and relevance of contested evidence."). Hence, by definition, evidence failing to meet the *Daubert* tests has *no* reliability and *no* probative value, and no objection to admissibility should be required in order to pursue a later challenge to its sufficiency.[5]

Of course, evidence *admissible* under *Daubert* ultimately may be found by a trier of fact to have insufficient weight or may, if a mere scintilla, be held by a court to be legally insufficient to support a judgment. *See Daubert*, 509 U.S. at 2798. However, the converse (i.e., that evidence *inadmissible* under *Daubert* can somehow attain relevancy or legal sufficiency that it never had) does not follow. Indeed, because *Daubert* is founded upon application of fundamental principles embodied in the Federal Rules of Evidence (509 U.S. at 587), evidence insufficient under *Daubert* should also be held insufficient under those rules.

The second critical problem with the Ninth Circuit's ruling is that, contrary to respondent's contention (Opp., pp. 26-27), it is not limited to cases involving scientific evidence and application of *Daubert*. Rather, it necessarily applies to *all* cases involving insufficiency of evidence. In this regard, respondent ignores the Ninth Circuit's holding on this point; namely that, when a party waives an objection to admissibility on the ground of insufficiency of the evidence, it also waives later objection to insufficiency itself "because its insufficiency argument is identical to the admissibility ob-

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[5]The third case cited by respondent in this regard, the unpublished opinion in *Thomas v. American Cyanamid Company*, 1993 WL 369129 (6th Cir. 1993), holds that the district court's rejection of purported scientific evidence as "insufficient" was "not inconsistent with *Daubert*."

jection which it waived." Pet. Appx. A, p. 15a. If this were a correct application of Rules 401 and 402, then the sufficiency of *any* type of evidence could never be challenged absent a ruling on a preceding admissibility objection on the same ground. Thus, the Ninth Circuit's ruling is in direct conflict with the rules applied in other circuits. *See* Pet., pp. 18-19. That ruling will inevitably engender confusion about both the correct application of *Daubert* in particular and the rules governing the sufficiency of evidence in general.

Respondent attempts to evade these critical issues by asserting that the evidence presented by its "highly competent scientists" was reliable and sufficient under *Daubert* and that petitioner "begs questions that could have been resolved if it had obtained a ruling on its pre-trial objection." Opp., p. 26. In so arguing, it is respondent that begs the question. First, respondent ignores the admission of its own "highly competent scientist" Kim Nelson that "there's no data" whatever in support of respondent's theories about how "injury" to murrelets might result from the proposed harvest. RT 379, 5-9, quoted in full at Pet. p. 16. Second, the competency of respondent's witnesses is not at issue here. The sufficiency of their evidence, and how objection to that sufficiency is to be made, is.[6] Third, petitioner's decision to allow respondent to present its case at trial does not change the substance of petitioner's objection to respondent's evidence. Petitioner has maintained throughout that respondent's evidence is insufficient to support the findings

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[6] Respondent stresses that its witnesses developed their ideas "independent of the litigation." Opp., p. 26, emphasis deleted. Although that may be true, it is not the only factor to be considered in judging scientific reliability under *Daubert*. *See* 509 U.S. at 593-594. Moreover, although respondent's witnesses may have developed theories "independent" of this particular case, their interests and preconceived biases are abundantly clear.

and judgment. No party should be required, as the Ninth Circuit's ruling requires, to make persistent objections to admission of evidence on the ground of insufficiency. Rather, a party should be allowed to choose whether to object to particular evidence or to later challenge the sufficiency of the evidence as a whole. Failure to obtain a ruling on admissibility of evidence without probative value "adds nothing to its worth and it will not support a finding." *McCormick on Evidence*, § 54 (4th ed. 1992).

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Certiorari, this Court should grant the Petition.

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